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IN THE

Supreme Court of the United States

October Term, 1980

UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES J. RESTIVO, JR.*
DIANE W. PERER
MARK D. SPEAKER
REED SMITH SHAW & MCCLAY
P.O. Box 2009
Pittsburgh, Pennsylvania 15230
(412) 288-3122

Counsel for Petitioner
*Counsel of Record

Of Counsel:
RONALD F. TALARICO
Office of University Counsel
University of Pittsburgh
3209 Cathedral of Learning
Pittsburgh, Pennsylvania 15260

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

QUESTIONS PRESENTED

Where, in investigating a charge of salary discrimination filed on behalf of female faculty members employed in a Nursing School of a University employer,[1] the Equal Employment Opportunity Commission ("EEOC") subpoenas as "relevant" evidence under 42 U.S.C. §2000e-8(a) the salary and personnel records of faculty employed in Schools of Pharmacy, Health-Related Professions and Social Work and the employer's verified answer denies that salaries in other professional schools are relevant:

1. Has the EEOC subpoenaed relevant evidence where its unsupported belief is that all faculty members are "teachers" performing "similiar duties," but the employer's unrebutted evidence proves that faculty members in different professional schools have such different functions, skills, responsibilities and disciplines that their salaries and jobs are neither similar nor comparable?

2. Can claims of sex discrimination in salaries paid in one profession be proven by evidence of salaries paid in unrelated, dissimilar and non-comparable professions?

3. Do the subpoena enforcement standards of *United States v. Powell,* 379 U.S. 48 (1964), apply to Title VII and, if so, does the EEOC have the burden of proving the relevance of the information subpoenaed?

4. Is a ruling, based upon undisputed facts, that subpoenaed information is relevant a factual finding reviewable under a "clearly erroneous" standard or a legal conclusion reviewable as an error of law?

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1. The University of Pittsburgh is a non-profit corporation and has no parents or subsidiaries within the contemplation of Rule 28.1 of the Rules of the Supreme Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, University of Pittsburgh, respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on March 17, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated March 17, 1981, is unofficially reported at 25 CCH Empl. Prac. Dec. ¶ 31,677 and appears as Appendix A hereto. The opinion of the United States District Court for the Western District of Pennsylvania dated March 26, 1980 enforcing the subpoena is reported at 487 F. Supp. 1071 and appears as Appendix B hereto. The order of the District Court dated April 7, 1980 denying the University's Motion for Rehearing is unreported and appears as Appendix C hereto.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on March 17, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 709(a) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 255, 42 U.S.C. §2000e-8(a), provides for access by the EEOC to evidence relevant to a charge under investigation. Section 710 of Title VII, 78 Stat. 264, *as amended*, 42 U.S.C. §2000e-9, applies Section 11 of the National Labor Relations Act to investigations conducted by the EEOC. Section 11 of the National Labor Relations Act, 49 Stat. 455, *as amended*, 29 U.S.C. §161(1) and §161(2) provides for the summoning of witnesses and court enforcement of subpoenas. These statutory provisions are set out verbatim in Appendix D.

STATEMENT OF THE CASE[2]

On July 8, 1977, Margaret F. Carroll of the American Nurses' Association filed a charge of sex discrimination with the EEOC accusing the University of discriminating against female faculty members by paying them lower salaries and fringe benefits than males. (R.9a). The charge was filed on behalf of 29 full-time faculty members of the University's School of Nursing. (R.10a-14a, 81a, 155a).[3]

On August 1, 1978, the EEOC issued a subpoena to the University demanding, for a three-year period, the

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2. References are to the Record (Appendix) in the Third Circuit below.

3. The complete charge is set out in note 1 of the Opinion of the Third Circuit. (App. A at 3a). The Third Circuit found that the EEOC was investigating "unlawful discrimination by the University against female faculty members in the School of Nursing." (App. A at 2a).

sex, date of hire, date of termination, academic degree, tenure/non-tenure status, positions held, initial and present salaries, functional job description and job qualifications of every full-time and part-time Assistant Instructor, Instructor, Assistant Professor, Associate Professor and Professor employed in four separate and distinct professional schools of the University: Nursing, Social Work, Health-Related Professions and Pharmacy. (R.26a-28a).[4]

The EEOC claimed that salaries and job information on faculty members other than in the School of Nursing would demonstrate the employment practices and patterns of the University and would support the charge of discrimination if "women instructors and professors performing similar duties are paid lower salaries than male instructors and professors." (R.33a). The University had explained to the EEOC that the highly sensitive and confidential salaries could not be so compared because of the vast differences between faculty members teaching different disciplines in different schools. (R.30a-31a).

On November 19, 1979, the EEOC applied to the District Court for an order enforcing the subpoena. (R.4a-34a). In its verified answer, the University *inter alia* denied the relevance of the subpoena and alleged that the information sought was beyond the scope of any relevant inquiry, was immaterial, involved inappropriate comparisons, and invaded confidential faculty records. (R.37a-44a).

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4. The subpoena is set out in note 2 of the Opinion of the Third Circuit. (App. A at 3a-4a). The subpoena covers 190 full-time and all part-time faculty members in the four Schools. (R. 160a).

At the hearing in the District Court, the University requested that the EEOC support, by competent evidence, its averments of relevance, proper purpose and compliance with applicable law and regulations. The District Court overruled the request and placed upon the University the burden of going forward with the evidence. (R.82a-84a). The University then called as of cross-examination Paul Southworth, the EEOC Compliance Officer handling the charge.

Mr. Southworth was unable to explain the reason he selected the four schools of the University or why he subpoenaed the information he did. Initially, he stated that he decided he would question the charging parties to find out what health-related schools were similar to the School of Nursing. (R.58a). The only reason he could give for the scope and content of the subpoena was that all faculty members "are teachers." (R.58a, 59a, 60a, 72a, 73a). He finally conceded that he did not know why he subpoenaed the information he did (R.60a):

> "Q Why did you pick the School of Pharmacy?
>
> "A Well, like I said, its been a year and a half since we had the case. As to why we actually decided on those particular schools, I would be really taxing my memory at this point because, like I said, it was discussed between myself and District Counsel at that time. And I've had numerous cases since that time.
>
> "Q Would it be fair to summarize your testimony as saying you know you had a reason at that time, but you can't remember what it was today? Is that a fair statement?
>
> "A That's correct."

Counsel for the EEOC then had Mr. Southworth testify that the sole purpose for the subpoena was to compare female faculty members in one School with male faculty members in another School (R.74a-75a):

> "Q Is it your testimony now that the purpose for this information was to compare a School of Nursing Instructor with a School of Engineering Instructor?
>
> "A Well, that would—would have been one of the comparisons.
>
> "Q Is it your statement that the purpose of the investigation was to compare the School of Pharmacy Professor with a School of Nursing Professor?
>
> "A Yes, that would have been another comparison.
>
> "Q Is it your statement now then that the sole purpose of this request for information was to request information that would allow you to compare instructors or professors across school lines?
>
> "A Yes."

After the sole purpose for the subpoena was established, the Deans of the four Schools testified. Their unrebutted, undisputed testimony proved that the comparisons sought to be made by the EEOC could not be made and would be irrelevant to Nursing School salaries.

The Deans testified that each School had striking differences in the factors influencing faculty salaries, duties and responsibilities, such as level of faculty education, level of academic programs, teaching loads, length of contracts, research duties, publishing activities, external competition for faculty services, and so forth. Exhibit A (R.160a) charted these differences and

eventually was stipulated to as accurate by the EEOC. (R.140a, 150a).

Both the chart and the testimony established that faculty salaries in one School had no relevance to salaries in other Schools since the different professional schools had separate and distinct missions, different average levels of faculty academic achievement, different sources of external funding and different requirements for faculty to publish or do clinical research. Additionally, each school was unique in the extent of its graduate and undergraduate programs, its accreditation regulations, and the ability of its faculty members to engage in private practice. Most importantly, salaries of faculty members were influenced by the marketplace—*e.g.*, the School of Pharmacy had to offer a salary high enough to attract professionals to the School as an alternative to working as a private practicing Pharmacist or for a large pharmaceutical company. (R.66a-67a).

On March 26, 1980, the District Court issued an Opinion and Order enforcing the subpoena. While recognizing that the University's testimony on the vast differences between faculty members in separate schools contrasted with the EEOC's belief that all instructors and professors were "performing similar duties," the District Court ruled that it "could not take the word of the University" that any comparisons were meaningless, especially since "the entire faculty in the School of Nursing is female."[5] (App. B at 20a-23a).

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5. In fact, at least one faculty member was male. (*e.g.*, 156a, 177a). The District Court also erred in treating the School of Social Work as a health-related School and in failing to examine, as requested by the University, the need for information on part-time faculty members.

The District Court also held that there was a University-wide policy being challenged, and that claims of confidentiality and privilege lacked merit. The District Court ignored the University's proposed findings of facts. (R.45a-53a).

The University appealed the judgment of the District Court[6] to the United States Court of Appeals for the Third Circuit. On March 17, 1981, The Third Circuit affirmed the decision of the District Court. The Third Circuit held that the trial court's ruling that the subpoenaed information was relevant was not clearly erroneous because "such information may provide a useful context for evaluating the practices under investigation" and because the School of Nursing was "almost totally female." (App. A at 6a-7a). The Third Circuit, while recognizing the Government's burden of proving relevance, did not rule on the University's contention that the burden of proof had been improperly placed on the University.

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6. On April 4, 1980, the University had filed a motion for rehearing in the District Court on the grounds (R.174a-183a) that: contrary to the court's decision, the University consistently had denied the validity of the subpoena; the court incorrectly found as a fact that none of the faculty in the School of Nursing were male; the court failed to find that the uncontradicted evidence proved comparisons across school lines were inappropriate; the court improperly placed the burden of proof on the University; the court incorrectly found that the School of Social Work was a health-related school; and the court failed to distinguish between full-time and part-time faculty members. On April 7, 1980, the District Court denied the University's Motion by taking the University's proposed Order, crossing out its provisions and writing across it "Motion denied." (App. C at 29a-30a).

REASONS FOR GRANTING THE WRIT

Conflicting principles are applied in the Circuit Courts of Appeal on whether salaries paid in different branches of a multi-faceted employer to unequal, dissimilar and noncomparable professions are relevant to each other in Title VII subpoena enforcement actions or litigation on the merits of a discrimination charge. Aspects of this issue are already before this Court in two pending cases, the resolution of which will affect the outcome of the instant case.

In addition, the Court of Appeals for the Third Circuit has decided issues of great significance to academic institutions and the business community which have not been passed upon by this Honorable Court. A decision on the issues raised by this petition will be of great use, will provide guidance and will limit litigation on these matters in the future.

Finally, the decision below grants the EEOC unbridled discretion in the course of its investigation of charges of discrimination. Administrative subpoenas for irrelevant, confidential and sensitive salary records which can then be disclosed to charging parties, invades the privacy of individuals, disrupts the operation of institutions, fosters employee resentment and encourages litigation. In light of the serious adverse consequences to academic and business employers which result from the decision below, this Court should review the decision.

ARGUMENT

1. This Court Should Grant Certiorari Because The Decision Below Conflicts In Principle With Decisions Of Other Courts Of Appeals As To The Relevancy Of Salaries Paid In One Profession To Salaries Paid In A Totally Different Profession.

From its inception, a university has been a place of useful, professional training. The job of the medieval university was to produce a number of professionals which contemporary society needed—lawyers, doctors, clergy, civil servants and scholars.[7] The modern university has its roots in the medieval concept of a community of scholars practicing separate and distinct professions and disciplines. As a result, colleges and universities are unique among those employment settings covered by Title VII. Unlike blue-collar workers on an assembly line, academicians with different professional backgrounds, training and experience are neither similar to nor comparable to one another.

The EEOC's subpoena in the instant case sought from the University the salaries, experience, qualifications, job histories, job descriptions and other information on all full-time and part-time faculty members employed in four separate and distinct professional schools to determine if female faculty members were being paid less than males for "performing similar duties." At trial, the EEOC testified that the "sole reason" for the information sought was to compare faculty members' salaries across professional school lines.

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7. W. NIBLETT, UNIVERSITIES BETWEEN TWO WORLDS, at 16 (Halsted Press, 1974).

While statistical comparisons are permitted in Title VII litigation, *Teamsters v. United States,* 431 U.S. 324 (1977), statistical information is relevant only if it compares similar groups of people. *See Hazelwood School District v. United States,* 433 U.S. 299, 308, n.13 (1977); *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 620-621 (1974). The evidence adduced below unequivocally demonstrated that faculty members in different professional schools not only do not perform "similar duties," but also that their jobs are so different that they cannot even be compared on any rational basis.

Other courts of appeals have found that salary discrimination cannot be proven by comparison of the salaries of one profession with those of another. *E.g., Lemons v. City and County of Denver,* 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S.Ct. 244 (1980) (comparison of nurses' jobs to other jobs is inappropriate). *See, e.g., Keyes v. Lenoir Rhyne College,* 15 F.E.P. Cases 914 (W.D.N.C. 1976), *aff'd,* 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977) (female professor could not show sex-based salary discrimination by comparing her salary to the salaries of professors in other departments of the university); *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977) (female clerical employees at a state university could not establish salary discrimination by comparing their salaries with male employees in a school's physical plant department). *Compare, International Union of Electrical Workers v. Westinghouse Electric Corporation,* 631 F.2d 1094 (3d Cir.), *petition for cert. filed,* 49 U.S.L.W. 3456 (Dec. 11, 1980) (assembly line jobs historically ranked on a job point salary scale may be compared under Title VII); *Gunther v. County of Washington,* 602 F.2d 882 (9th Cir.), *reh. de-*

nied, 623 F.2d 1303 (9th Cir. 1979), *cert. granted,* 101 S.Ct. 352 (1980) (jobs of male prison guards and female matrons in the same prison may be compared); *EEOC v. University of New Mexico,* 504 F.2d 1296 (10th Cir. 1974) (salary and personnel records of all faculty members in an Engineering School are relevant to a charge of national origin discrimination by an Associate Professor in the Electrical Engineering Department of that School).

If salary comparisons between groups of employees who perform different jobs are irrelevant to prove discrimination under Title VII, they are likewise irrelevant to an EEOC investigation of whether discrimination exists. Moreover, the fact that a particular group of employees—here, School of Nursing faculty members—is predominantly female does not make their jobs similar to other professions.

An analogous conflict in principle also exists in the courts of appeals concerning whether a charge of discrimination by an employee in one discrete department of a multi-faceted employer can support an EEOC subpoena for records of employees in other departments or locations.

One line of circuit court cases suggests that EEOC subpoenas must be limited to the unit employing the charging party. *See, e.g., EEOC v. Packard Electric Division, General Motors Corp.,* 569 F.2d 315 (5th Cir. 1978) (in investigating two individual charges of discrimination, plant-wide "workforce breakouts" could not be subpoenaed because they went beyond the employee's work unit); *accord: Marshall v. Westinghouse Electric Corp.,* 576 F.2d 588, 592 (5th Cir.) *reh. denied,* 582 F.2d 966 (5th Cir. 1978) (in age discrimination suit, field operator may not seek employment in-

formation regarding 7500 employees without a showing of a special need for information beyond his employing or work unit); *Joslin Dry Goods Co. v. EEOC,* 336 F. Supp. 941 (D. Col. 1971), *aff'd in relevant part,* 483 F.2d 178 (10th Cir. 1973) (charge of race discrimination by an individual employed at one store does not justify an EEOC subpoena for employment records at other retail outlets of the employer); *Union Bank v. EEOC,* 296 F. Supp. 313 (C.D. Cal. 1967), *aff'd on other grounds,* 408 F.2d 867 (9th Cir. 1968) (charge of discrimination by female bank lawyer does not justify an EEOC subpoena for records of all employees in all departments and branches).

Another line of circuit court decisions, however, hold that individual charges of discrimination support an EEOC subpoena for employment records of unrelated departments or locations. *See, e.g., EEOC v. Western Publishing Co.,* 502 F.2d 599 (8th Cir. 1974); *Parliament House Motor Hotel v. EEOC,* 444 F.2d 1335, 1340 (5th Cir. 1971); *Blue Bell Boots, Inc. v. EEOC,* 418 F.2d 355, 358 (6th Cir. 1969).

These conflicts in principle between the decisions of the courts of appeals of the United States present this Court with the important issue of whether salaries paid in different branches of a multi-faceted employer to unequal, dissimilar and noncomparable professions may be demanded through the use of administrative subpoenas on the ground that the salaries are relevant to each other. A grant of certiorari should issue to resolve these conflicts.

2. This Court Should Grant Certiorari Because The Decisions Below Involve Issues Presently Pending Before This Court, The Resolution Of Which Will Have A Direct Bearing On This Case.

Two cases presently are pending before this Court which will have a significant impact on the resolution of this action. *Gunther v. County of Washington,* 602 F.2d 882 (9th Cir.), *reh. denied,* 623 F.2d 1303 (9th Cir. 1979), *cert. granted,* 101 S.Ct. 352 (1980), was argued before this Court on March 23, 1981. In *Gunther,* female prison guards at a jail in which both men and women worked as guards alleged that they were denied equal pay for equal work and, alternatively, that pay discrepancies for work not substantially equal was the result of sex discrimination.

After affirming the District Court's finding that the jobs of male and female guards were not substantially equal, the Ninth Circuit rejected the employer's argument that the Bennett Amendment imposed the Equal Pay Act's "equal pay for equal work" standard on Title VII wage discrimination claims. Instead, the Ninth Circuit held that the Bennett Amendment incorporated only the Equal Pay Act's four affirmative defenses and not the requirement of equal work in Title VII actions. As a result, the Ninth Circuit permitted comparisons of similar but unequal jobs in assessing the presence of a Title VII violation.

In *International Union of Electrical Workers v. Westinghouse Electric Corp.,* 631 F.2d 1094 (3d Cir.), *petition for cert. filed,* 49 U.S.L.W. 3456 (Dec. 11, 1980), the Third Circuit adopted the Ninth Circuit's view of Title VII in holding that assembly line jobs which were unequal, but which the employer historically had point-

rated in relation to each other, could be compared to determine wage discrimination under Title VII.

If this Court reverses the holdings of *Gunther* or *Westinghouse* and instead approves the decisions of the Fourth, Eighth, and Tenth Circuits,[8] then the Third Circuit's decision in this action must be reversed because here the EEOC concedes and the facts show that the professions involved are not equal.

Similarly, if this Court finds in *Gunther* or *Westinghouse* that unequal but similar jobs may be compared in a Title VII wage discrimination action if certain criteria are met, then the decision below must be reversed because the facts show that the faculty jobs at issue are not similar.

On the other hand, if this Court decides in *Gunther* or *Westinghouse* that totally different jobs may be compared if certain criteria are met, then the decision below either must be affirmed, or it must be remanded for a determination of whether such criteria have been met.

Therefore, while this is not a case in which so-called "comparative worth" of dissimilar, but comparable jobs has been directly put at issue, since the jobs in this case are not comparable, this Court's resolution of *Gunther* or *Westinghouse* will substantially affect the resolution of this action.

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8. *See, e.g., Lemons v. City and County of Denver,* 620 F.2d 228 (10th Cir.), *cert. denied,* 101 S.Ct. 244 (1980); *Christensen v. State of Iowa,* 563 F.2d 353 (8th Cir. 1977); *Keyes v. Lenoir Rhyne College,* 15 F.E.P. Cases 914 (W.D.N.C. 1976), *aff'd,* 552 F.2d 579 (4th Cir.), *cert. denied,* 434 U.S. 904 (1977).

3. This Court Should Grant Certiorari To Resolve Whether The United States v. Powell Standards For Subpoena Enforcement Apply To Title VII And, If So, Whether An Administrative Agency Can Satisfy Its Burden Of Proof Of Relevancy Of The Information Subpoenaed Through Controverted Pleadings.

In order to secure enforcement of an Internal Revenue Service subpoena, the Government must establish that the subject investigation is conducted pursuant to a legitimate purpose, the inquiry is relevant to that purpose, the information sought is not in the agency's possession and the required administrative procedures have been followed. If this burden is satisfied, the party subpoenaed has the burden of proving bad faith or abuse of process. *United States v. Powell,* 379 U.S. 48, 57-58 (1964); *United States v. LaSalle National Bank,* 437 U.S. 298, 313 (1978). At least with respect to the Internal Revenue Service, a subpoena enforcement action is an adversary proceeding which should afford a judicial determination to the person or company summoned. *Reisman v. Caplin,* 375 U.S. 440, 446 (1964).

There is no decision of this Court dealing with EEOC subpoenas and the extent to which the *Powell* standards apply to Title VII. Nor has this Court determined the nature of adversary subpoena enforcement actions and how the Government agency satisfies its burden of proof. The circuit courts have not found a consistent approach to these issues.

In the Third Circuit, at least until the instant Title VII case, where the allegations of a subpoena enforcement petition are denied or controverted, the Government has to go forward to prove that the summons com-

plies with the *Powell* requirements. *United States v. McCarthy,* 514 F.2d 368, 372-73 (3d Cir. 1975). *See United States v. Garden State National Bank,* 607 F.2d 61, 70-71 (3d Cir. 1979).

In some circuits, however, the *Powell* standards can be satisfied by affidavit, although it is unclear if this rule is applicable if the respondent disputes the facts in the affidavit. *See, e.g., United States v. Davis,* 636 F.2d 1028, 1034 (5th Cir. 1981); *United States v. Horton,* 629 F.2d 577, 579 (9th Cir. 1980); *United States v. Moon,* 616 F.2d 1043 (8th Cir. 1980); *United States v. Freedom Church,* 613 F.2d 316 (1st Cir. 1979).[9] In the Tenth Circuit, with respect to subpoenas of the National Labor Relations Board, the burden of proving lack of relevance by specific evidence has been placed on the respondent. *N.L.R.B. v. Dutch Boy, Inc., Glow Lite Division,* 606 F.2d 929, 932 (10th Cir. 1979).

With respect to EEOC subpoenas in the Eighth Circuit, no adversary hearings are deemed necessary in subpoena enforcement actions. *See EEOC v. Chrysler Corp.,* 567 F.2d 754, 755 (8th Cir. 1977); *EEOC v. Quick Shop Markets, Inc.,* 526 F.2d 802, 803 (8th Cir. 1975).

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9. Since subpoenaed income tax records normally would be relevant to enforcement of the tax laws, disputes concerning Internal Revenue Service subpoenas usually center on whether the information is being gathered for a civil or criminal purpose. Relevance is not usually disputed. Where the Government has made a prima facie showing through affidavits and testimony, *e.g., United States v. MacKay,* 608 F.2d 830, 833 (10th Cir. 1979); *United States v. Moll,* 602 F.2d 134 (7th Cir. 1979), or the allegations in the Government's moving papers have not disputed, *e.g., United States v. Powell, supra; United States v. Harris,* 628 F.2d 875, 880 (5th Cir. 1980), the Government's burden of proof is not at issue.

In the instant case, the University's verified answer contradicted the claims of relevance in the EEOC's petition and affidavit. Nonetheless, the District Court refused to require the EEOC to go forward with evidence that the information subpoenaed was relevant.

The Third Circuit, while holding that the *Powell* standards apply to Title VII subpoenas (App. A at 5a), failed to consider whether the District Court had improperly shifted the burden of proof on relevance to the University. The Third Circuit merely sifted through the information that was elicited by the University and concluded, without further elucidation, that the information "may provide a useful context for evaluating the practices under investigation."[10]

Allowing a Government agency to stand on its pleadings, which have been contradicted, forces the respondent first to establish the Government's theory of relevance and then to disprove the relevance of the information sought. In the instant case, the EEOC's theory of relevance was that salaries in one School could be compared with salaries in other Schools. The Univer-

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10. The Third Circuit may have felt that the subpoenaed information would be relevant not for comparison purposes, but to establish a pattern or practice of salary discrimination on a university-wide basis. *See, e.g., Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 358 (6th Cir. 1969). However, such a theory is dependent upon evidence of centralized control of salary decisions across many departments or divisions. This theory was not presented at the hearing in the District Court. Had this been the EEOC's claim of relevance, the University would have had the opportunity to show that salary decisions in separate schools of the University are separately made and dependent upon market conditions and other factors not centrally determined.

sity's unrebutted evidence demonstrated that this was not the case.

The Third Circuit, by holding that the salary comparisons sought would provide "a useful context for evaluating the practices under investigation" found relevancy for a reason different than the one asserted by the EEOC at the subpoena enforcement hearing in the District Court. Such a result denied the University a meaningful adversary proceeding, since the University was never given the opportunity to disprove the theory that the statistical information sought concerning other professional schools would provide "a useful context for evaluating the charges under investigation."

This Court should grant certiorari to determine that the *Powell* standards apply to EEOC subpoenas, that the employer subpoenaed is entitled to an adversary proceeding if allegations of relevance are contradicted and that the Government has the burden of going forward to prove the relevance of the information subpoenaed.

4. This Court Should Grant Certiorari Because The Decision Below Implicates Important Issues Of National Interest.

The decision of the court below will have a major and significant impact on academic institutions and businesses alike. The decision below permits widespread discovery by the Government of facts which the undisputed evidence shows are clearly not relevant, solely upon the EEOC's theory that all faculty members are "teachers" and therefore must be involved in performing "similar duties." The decision below, in effect, permits the EEOC to squeeze the academic model into an indus-

trial assembly line mold despite the actual facts of the situation.[11]

The expansive subpoena power given the EEOC by the court below has wide-ranging implications.

First, any charge of salary discrimination by an individual will now force an employer to disclose otherwise confidential and sensitive payroll records.[12] A charging party employed in one discrete segment of an employer's multi-segmented operation could trigger the disclosure of salaries and qualifications in separate and distinct work places.

Second, the harms caused by such disclosure are compounded because the records obtained by the EEOC are then available to the charging party. *EEOC v. Associated Dry Goods Corp.,* 101 S.Ct. 817 (1981).

At a university, such disclosure can only foster academic jealousy and unrest. In this era of double-digit inflation, no issue poses a greater threat to col-

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11. There is no logical line which can be drawn which would restrict the type of information the EEOC demands in the instant case. Nurses could be compared with Engineers, Lawyers and Nuclear Physicists. Historians could be compared with Physicians, Dentists or Physical Therapists. Moreover, the unreasonableness of this approach is further highlighted in the instant case by the fact that the subpoena's broad sweep picks up part-time faculty members despite the undisputed testimony that their function and roles bear no relationship to those of full-time faculty members of the academic community. (R. 105a, 138a, 140a).

12. It is undisputed in the instant case that each School's faculty and payroll records are kept highly confidential and are not disclosed even by one Dean to another Dean. (R. 145a, 155a, 157a).

legial cooperation and harmony than that of academic salaries. Faculty and administrators safeguard faculty payroll records because salaries are frequently the source of intra-faculty rivalries, especially when monetary reward is taken as a measure of professional success and one's worth to the academic institution.[13] Accordingly, anti-discrimination regulations must be discerningly applied to colleges and universities in order to avoid imposing "requirements that blunt that professional drive and discourage salary differentials according to merit of performance as teacher-scholars."[14]

To permit one faculty member or a group of faculty members to discover the salaries of faculty members employed in different professional schools can only serve to exacerbate intra-faculty rivalries in this era of rising costs and shrinking academic dollars. When the undisputed facts show that no valid comparisons can be made, the academic and financial costs[15] of such disclosure outweigh any possible benefits.

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13. R. LESTER, ANTI-BIAS REGULATION OF UNIVERSITIES: FACULTY PROBLEMS AND THEIR SOLUTIONS, at 28 (McGraw Hill, 1974) (Report to the Carnegie Commission on Higher Education). Other academicians have also expressed concern about the effect salary disputes may have on an academic institution's commitment to learning. Trachtenberg, "One Head is Better than Two," *Change,* Vol. 10, at 6-7 (May 1978).

14. R. Lester, note 12 *supra* at 29.

15. *See generally* M. WEIDENBAUM AND R. DEFINA, THE COST OF FEDERAL REGULATION OF ECONOMIC ACTIVITY (American Enterprise Institute, 1978); C. VAN ALSTYNE and S. COLDREN, THE COSTS OF IMPLEMENTING FEDERALLY MANDATED SOCIAL PROGRAMS AT COLLEGES AND UNIVERSITIES (American Council on Education, 1976).

Third, to order the disclosure of marginally relevant information through a subpoena enforcement proceeding on the ground that a subsequent court will determine its admissibility simply ignores the realities of Title VII litigation. For example, in *Johnson v. University of Pittsburgh,* 435 F. Supp. 1328 (W.D. Pa. 1977), an individual charge of sex discrimination in the denial of tenure, and the wide-ranging discovery permitted in connection therewith, resulted in a trial lasting 74 days, involving 73 witnesses, almost 12,000 pages of testimony and 1,000 exhibits, with the court ultimately finding that the University had not been guilty of discrimination.

In another faculty discrimination case, the court was forced to sift through reams of "regression analyses" and other statistics only to conclude finally that "it is almost impossible, in the fact situation that the Court is presented with, to measure the differences in salaries between men and women by statistical analysis." *Presseisen v. Swarthmore College,* 442 F. Supp. 593, 619 (E.D. Pa. 1977), *aff'd without opinion,* 582 F.2d 1275 (3d Cir. 1978). Resolution of relevance disputes at the beginning of a Title VII proceeding will save the courts and litigants the needless time and expense of preparing, producing and explaining statistical comparisons which a court subsequently rules inadmissible.

Fourth, the judicial recognition of such wide latitude in the EEOC frustrates Title VII enforcement. As stated by EEOC Chairperson Eleanor Holmes Norton in her appearance before the House Labor Subcommittee on Employment Opportunities on July 27, 1977:[16]

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16. *Oversight Hearing on Equal Employment Opportunities,* Subcommittee on Equal Employment Opportunities of the Committee on Education and Labor,

"In the past the Commission has tended to construe charges of discrimination broadly and has sometimes encouraged complainants to file charges that contain broad and general allegations of discrimination."

* * * *

"History, however, has demonstrated that this approach has had an adverse effect on individual complainants."

* * * *

"We will better serve both the complainant's interest and the large public interest in eliminating discrimination by separating insofar as possible the processing of the individual complaint and the elimination of systemic discrimination. Thus we will construe complaints as relating to the harm that the individual has suffered. We will investigate that harm. In that investigation, of course, we will examine the extent to which the employer's restriction or exclusion of minorities or women as a class may have contributed to a particular individual employment decision. However, we will do this by a sharply focused investigation of the general statistics of the employer and the activities in the particular unit in which the discrimination is alleged to have occurred. . . ."

Fifth, the extremely sensitive nature of faculty salaries in this era of economic difficulty mandates that, to the extent salary information is required by the EEOC, it be limited as much as reasonably possible.

NOTE 16—*(Continued)*
House of Representatives, 95th Cong., 1st Sess. 51 (July 27, 1977) (Testimony of Eleanor Holmes Norton), reproduced at BNA *Daily Labor Reporter,* No. 145 (July 27, 1977).

Both the academic institution and its faculty members have a reasonable expectation of privacy of the records sought by the EEOC and this expectancy should be protected. *See generally* Mironi, *The Confidentiality of Personnel Records: A Legal and Ethical View,* 1974 Labor L. J. 270 (1974); Comment, *EEOC v. University of New Mexico—10th Circuit Reduces Standards For Production Of Employee Personnel Files In EEOC Investigation,* 1975 Utah L. Rev. 264 (1975).

The very serious consequences of the approach taken by the court below should not be permitted without review by this Court.

5. This Court Should Grant Certiorari Because The Decision Below Conflicts With Decisions Of Other Courts Of Appeals As To The Standard Of Review Of A Ruling That Subpoenaed Information Is Relevant.

In concluding that the EEOC had satisfied the *Powell* criteria for enforcement of its administrative subpoena, the District Court held that the subpoenaed information was relevant. The Third Circuit reviewed this holding on the ground that it was not "clearly erroneous." (App. A at 7a). The Court of Appeals failed to recognize that a different standard of review, legal error, should have been applied on reviewing the District Court's ruling on relevancy.

This failure to recognize the existence of another standard for relevance conflicts with both the District of Columbia and the Fifth Circuits. Both circuits have recognized that the proper standard of review is heavily dependent on the circumstances of a given case. *FTC v. Texaco, Inc.,* 555 F.2d 862, 876, n.29 (D.C. Cir.), *cert. denied,* 431 U.S. 974, *reh. denied,* 434 U.S. 883 (1977); *EEOC v. Packard Electric Division, General Motors*

Corp., 569 F.2d 315, 317-18 (5th Cir. 1978). This Court has also recognized that subpoena enforcement decisions may be susceptible to varying standards of review. *See United States v. LaSalle National Bank*, 437 U.S. 298, 319, n.21 (1978) (leaving for another time a determination of whether the Internal Revenue Service's good faith is a legal or factual question or a combination thereof).

The standard of review that should have been applied in this action was that of legal error. Since the University's unrebutted testimony showed that the professions about which information was sought were totally dissimilar, there was no "factual determination" to be made concerning the relevancy of this information. *Packard Electric Division, supra,* at 318. Instead, the Third Circuit should have followed the District of Columbia and Fifth Circuits and recognized that where, as here, the issue of relevance is "integrally related to a legal premise," *FTC v. Texaco, Inc., supra,* at 876, n.29, then a finding of relevance is to be reviewed under the standard of legal error.

This Court should grant certiorari to determine the standard of review to be applied by the circuit courts in subpoena enforcement proceedings.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the Opinion and Judgment of the Third Circuit.

Respectfully submitted,

JAMES J. RESTIVO, JR.*
DIANE W. PERER
MARK D. SPEAKER
REED SMITH SHAW & MCCLAY
P.O. Box 2009
Pittsburgh, Pennsylvania 15230

Counsel for Petitioner
*Counsel of Record

Of counsel:

RONALD F. TALARICO
Office of University Counsel
University of Pittsburgh
3209 Cathedral of Learning
Pittsburgh, Pennsylvania 15260

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1854

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Appellee

v.

UNIVERSITY OF PITTSBURGH

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Misc. No. 7653

Argued November 3, 1980
Before: HUNTER, GARTH and HIGGINBOTHAM,
Circuit Judges
Opinion filed March 17, 1981

James J. Restivo, Jr. (Argued)
Diane W. Perer
Reed, Smith, Shaw & McClay
Attorneys for Appellant

Joel M. Cohn (Argued)
Vella M. Fink
Lutz Alexander Prager
Leroy D. Clark
Joseph T. Eddins
Attorneys for Appellee

Opinion of the Court

HUNTER, *Circuit Judge.*

1. Appellant, the University of Pittsburgh, appeals from the district court's order enforcing a subpoena duces tecum issued by the Equal Employment Opportunity Commission (EEOC). The EEOC requested the subpoena pursuant to an investigation of alleged unlawful discrimination by the University against female faculty members in the School of Nursing. The district court held that the issuance of the subpoena was within the power of the Commission and dismissed the University's counterclaim by sustaining the EEOC regulations that permit disclosure of investigative files to the charging party. We affirm the district court's enforcement order and in light of the Supreme Court's recent decision in *EEOC v. Associated Dry Goods,* 49 U.S.L.W. 4149 (Jan. 26, 1981) authorize release of the EEOC's investigative file to the charging party.

FACTS

2. On July 8, 1977, Margaret F. Carroll, Acting Executive Director of the American Nurses Association, ("ANA") filed a charge of sex discrimination with the EEOC. The charge alleged that the University of Pittsburgh discriminated against women faculty members by, *inter alia,* paying them lower monthly salaries than that paid to male faculty.[1]

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1. The complete charge, filed July 6, 1977, alleged:
The University of Pittsburgh has discriminated, and is still discriminating, against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees. Thus, the discrimination is based upon sex. Consequently, this action of the University of Pittsburgh amounts to an unlawful employment practice,

3. The EEOC began its investigation with a request for information concerning the sex, salary levels, experience, and job responsibilities of the faculty in four of the fifteen professional schools on the University's Pittsburgh campus; the Schools of Nursing, Pharmacy, Health Related Professions, and Social Work. The University refused to provide the information voluntarily, and on August 1, 1978 the district director of the EEOC's Pittsburgh office issued a subpoena duces tecum for the data.[2] The University filed a petition to quash the sub-

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and as such, is prohibited by the provisions of Title VII of the Civil Rights Act of 1964 as amended. Inasmuch as several fringe benefits are based upon or linked with salary, by paying women faculty employees lower monthly salaries than the ones paid to male faculty employees, the University of Pittsburgh is also guilty of committing an unlawful employment practice over other conditions of employment. This, too, constitutes discrimination based upon sex and is therefore prohibited by provisions of Title VII of the U.S. Civil Rights Act of 1964 as amended.

Exhibit A, Joint Appendix at 9(a).

Margaret Carroll certified she was filing the charge on behalf of twenty-nine present or former faculty members in the School of Nursing who claimed to be aggrieved by the University's practices. On August 12, 1977, the EEOC referred the charge to the Pennsylvania Human Relations Commission (PHRC) pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1974, as amended, 42 U.S.C. §2000-5(c) (1976). The ANA then requested the PHRC to terminate processing the charge, whereupon the EEOC reassumed jurisdiction of the complaint.

2. On August 1, 1978, a subpoena was issued, signed by the EEOC's District Director, requiring the University to produce the following:

1. Produce a list of all assistant instructors, instructors, assistant professors, associate professors

poena, and the Commission denied this request. In November of 1979, the EEOC filed an application to enforce the subpoena, pursuant to section 710 of Title VII, 42 U.S.C. §2000e-9 (1976). The University counterclaimed for injunctive and declaratory relief claiming that the EEOC regulations that permitted the disclosure of investigatory files prior to litigation violated the prohibition against public disclosure contained in section 709(e) of Title VII, 42 U.S.C. §2000e-8(e) (1976).[3]

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and professors in the Schools of Nursing, Pharmacy, Health Related Professions, and Social Work. For each, indicate sex, date of hire, date of termination, (if applicable), academic degree held, whether tenured or non-tenured, whether part-time or full-time, and position(s) held during the period June 1975 to present. Additionally, indicate each aforesaid employee's initial salary and present salary and length of term of annual contract of each; i.e., ten months, twelve months, etc.

2. Produce the written/printed functional job descriptions and all written/printed materials describing all duties and job/position requirements of all assistant instructors, instructors, assistant professors, associate professors, and professors in each of the aforesaid schools.

3. Produce the written/printed qualifications and requirements necessary to perform the duties of each position, occupied by assistant instructors, instructors, assistant professors, associate professors, and professors in each of the aforesaid schools.

If the records do not exist in the form requested in Item 1 above, production of the information therein requested as most substantively provides the Commission with that information will be accepted as compliance.

Joint Appendix at 28a.

3. The challenged regulations on disclosure of investigative files are found at 29 C.F.R. §§1601.22 & 1610.17(d) (1979).

4. After a full hearing on the merits, the district court ordered enforcement of the subpoena and authorized disclosure of the investigative material in accordance with agency regulations. *See* 29 C.F.R. §1601.22 (1979). In so ruling the court held that although the scope of the subpoena was quite broad, the material requested was relevant to the charge of sex based discrimination and should be produced.

5. On April 4, 1980 the University filed a motion for rehearing which the district court denied. This appeal followed.

DISCUSSION

A. Subpoena enforcement

6. *In Powell v. United States,* 379 U.S. 48, 57-58 (1964) the Supreme Court established three requirements for the enforcement of an administrative subpoena. Specifically, it is the government's burden to prove: (1) that the investigation has a legitimate purpose and that the inquiry may be relevant to that purpose; (2) that the information sought is not already within the government's possession; and (3) that procedures required by the agency issuing the subpoena have been followed. *Id. See also United States v. McCarthy,* 514 F.2d 368, 372 (3d Cir. 1975). The trial court found the subpoenaed information to be relevant, not already within the possession of the Commission, and requested pursuant to agency procedure. These findings are not clearly erroneous and we affirm the district court for the reasons discussed below. Fed.R.Civ.P. 52(a). *See Denicola v. G. C. Murphy, Co.,* 562 F.2d 889, 892 (3d Cir. 1977) (factual findings of district court in Title VII cases must be sustained unless clearly erroneous).

7. The University claims that because the EEOC is investigating solely the employment practices of the School of Nursing, the faculty information from other schools is irrelevant. There can be no comparison between the various schools within the University, appellant argues, because, among other things, the composition of the student bodies differs; the courses, programs, and research of each school are distinct; the external competition for faculty positions differs; and the amount of faculty research and publication required varies widely between schools.

8. The EEOC seeks the faculty employment records of four related schools. While the employment data from these schools may not be identical with data from the School of Nursing, such information may provide a useful context for evaluating the practices under investigation. A similar subpoena request was upheld by the tenth circuit in *EEOC v. University of New Mexico,* 504 F.2d 1296 (10th Cir. 1974), where the commission requested faculty employment records for the entire college of engineering even though the investigation was limited to the employment practices of the Department of Electrical Engineering and Computer Sciences. In enforcing the subpoena request, the court stressed that the material requested was relevant to the inquiry and sufficiently definite: "The inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is relevant. . . . All that is now required is that the investigation be for a lawfully authorized purpose." *Id.* at 1302, *quoting from, United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950). *Compare CAB v. United Air Lines,* 542 F.2d 394, 402 (7th Cir. 1976) (material sought amounted to a "general warrant"—enforcement denied). The material requested

here is not indefinite, but limited to the practices of four related schools within the University. Further, because the School of Nursing faculty is almost totally female, examination of other schools is crucial for any investigation of gender based discrimination. In light of these circumstances the material sought by the Commission is relevant. The investigatory powers of EEOC should be interpreted broadly; the material requested "relate[s] to unlawful employment practices" and is "relevant to the charge under investigation." §709(a); 42 U.S.C. §2000e-8(a) (1976); ***EEOC v. Cambridge Tile,*** 590 F.2d 205, 206 (6th Cir. 1979); ***Motorola, Inc. v. McLain,*** 484 F.2d 1339, 1342 (7th Cir. 1973).

9. The second element of the *Powell* prima facie test for the enforceability of a subpoena requires the Commission to show that the information sought by the subpoena is not already within the possession of the government. *United States v. Powell,* 379 U.S. at 580. The record at trial contains a letter from EEOC compliance officer, Mr. Paul Southworth, III to the University which identifies the material in issue and states that he will need access to it. Joint Appendix at 21a (exhibit F). On the basis of this letter it was not clearly erroneous for the lower court to conclude that the Commission did not possess the requested information.

10. The final criterion outlined by the *Powell* court for enforcing a subpoena requires the Commission to show that it has followed all the procedural steps mandated by statute. In this case, section 709(a) and 710 of Title VII, 42 U.S.C. §§2000e-8(a) & 2000e-9(a) require only that the subpoena be "[i]n connection with any investigation of a charge . . . and relevant to the charge." 42 U.S.C. §2000e-8(a) (1976). The Commission's regu-

lations outlining the procedures for issuing a subpoena require that:

> The subpoena shall state the name and address of its issuer, identify the person to whom and the place, date, and the time at which it is returnable or the nature of the evidence to be examined or copied, and the date and time when access is requested.

29 C.F.R. 1601.17 (1979). All this information was contained within the subpoena.

11. The EEOC's regulations also require that "[d]uring the Commission investigation, the Commission shall verify the authorization of such charges by the person on whose behalf the charge is made." 29 C.F.R. 1601.7 (1979). The district court found correctly that the Commission had satisfied the verification requirement in this instance. The Commission sent out questionnaires to each of the twenty-nine nursing faculty members listed as victims of the University's alleged discriminatory policies. These questionnaires requested various employment information that the individuals supplied. This procedure comported with the verification requirements of 29 C.F.R. 1601.7 (1979).[4]

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4. The University contends that because the Commission did not obtain signed affidavits from each of the twenty-nine individuals, a practice recommended by the EEOC compliance manual (CCH) §8.5(d) (1979), the charge was improperly verified. We reject this argument. As noted above, the procedures followed by the Commission in this case satisfy the mandate of 29 C.F.R. 1601.7 (1979). Further, the EEOC need not follow the procedures outlined in its compliance manual in every case. The manual's provisions are discretionary in this respect, and read that "[t]here may be instances when . . . a particular procedure . . . should not be followed." EEOC Compliance Manual (CCH) ¶ at 3.

B. *Disclosure of Investigatory Files*

12. At trial, the University counterclaimed for a declaratory judgment and injunctive relief claiming that the Commission's disclosure regulations, 29 C.F.R. §§1601.22 & 1610.17(d) (1979), were void and unenforceable. The district court dismissed the counterclaim and we affirm that dismissal.

13. Section 709(e) of Title VII, 42 U.S.C. §2000(e)-8(e) (1976), prohibits any employee of the EEOC, under pain of criminal penalty, from disclosing any information obtained during an EEOC investigation to the public. The challenged regulations carve out an exception to this general prohibition by authorizing disclosure of investigative files on an employer to the charging parties, the respondents, their attorneys, and witnesses when disclosures deemed necessary for securing appropriate relief. 29 C.F.R. §1601.22 (1979).[5] The Supreme Court in *EEOC v. Associated Dry Goods*, 49 U.S.L.W. 4149 (Jan. 26, 1981) recently sustained the

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5. The Commission's general policy on disclosure is set out in 29 CFR §1601.22:

> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publica-

validity of these precise regulations. In that case, the Court concluded that Congress did not include the charging parties within the "public" to whom disclosure of confidential information is illegal under the provisions of Title VII. Hence release of these files to charging parties does not fall within the disclosure prohibition of section 709(e). *Id.* at 4152-53. The Court did hold, however, that only the charging party is entitled to examine his file: files of similar complaints against the same employer are not to be released. As the Court stated: "there is no reason why the charging party should know the content of any other employee's charge, and he must be considered a member of the public with respect to charges filed by other people. With respect to all files other than his own, he is a stranger." *Id.* at 4153. Applied to this case, *Associated Dry Goods* mandates disclosure only to Margaret Carroll, the charging party, and her attorney.

14. The judgment of the district court, both in enforcing the subpoena and granting disclosure of the EEOC's file solely to Margaret Carroll and her attorney, will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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tion of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

The Commission also has created very specific special disclosure rules governing the form and scope of disclosure to those persons whom the Commission treats as being separate from the "public" to whom the statute forbids any disclosure. 29 CFR §1610.17(d); EEOC Compliance Manual §63.

Judgment of The Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-1854

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
vs.
UNIVERSITY OF PITTSBURGH,
Appellant

(D. C. Misc. No. 7653)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
Present: HUNTER, GARTH and HIGGINBOTHAM,
Circuit Judges

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on November 3, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 26, 1980, be, and the same is hereby affirmed, both in enforcing the subpoena and granting disclosure of the EEOC's file solely to Margaret Carroll and her attorney, all in accordance with the opinion of the Court. Costs taxed against appellant.

ATTEST:
/s/ SALLY MRVOS
Clerk

March 17, 1981

Appendix B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Applicant v. UNIVERSITY OF PITTSBURGH, Respondent	Miscellaneous No. 7653

OPINION

SNYDER, J.

Before the Court is an application of the Equal Employment Opportunity Commission (EEOC) for an order to require the University of Pittsburgh (University) to comply with the subpoena duces tecum served upon it by the EEOC during its investigation of a charge of unlawful discrimination against female faculty employees with respect to wages and conditions of employment.

I. PRIOR PROCEDURES

The charge filed July 6, 1977 alleged:

"The University of Pittsburgh has discriminated, and is still discriminating, against women faculty employees by paying them lower monthly salaries than the ones paid to male faculty employees. Thus, the discrimination is based upon sex. Consequently, this action of the University of Pittsburgh amounts to an unlawful employment practice, and as such,

> is prohibited by the provisions of Title VII of the Civil Rights Act of 1964 as amended. Inasmuch as several fringe benefits are based upon or linked with salary, by paying women faculty employees lower monthly salaries than the ones paid to male faculty employees, the University of Pittsburgh is also guilty of committing an unlawful employment practice over other conditions of employment. This, too, constitutes discrimination based upon sex and is therefore prohibited by provisions of Title VII of the U.S. Civil Rights Act of 1964 as amended."

This charge was prepared and signed by Margaret F. Carroll, Acting Executive Director of the American Nurses' Association (ANA). Attached to the charge was an EEOC Form 151, Third Party Certification of Charge, which gave the names, addresses, and telephone numbers of some ANA members aggrieved by the allegedly discriminatory conduct.

On August 12, 1977, the Pittsburgh District Office of the EEOC, pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000-5(c), referred the charge to the Pennsylvania Human Relations Commission. ANA then requested the Commission to terminate processing the charge, and the Commission agreed to do so on August 12th. The EEOC thereupon re-assumed jurisdiction over the charge, and the University was notified on August 17, 1977. EEOC Compliance Officer, Joel Pretz, attempted to secure an early conciliation of the charge but was unable to do so. As a part of the investigation, a letter was sent to the University on June 13, 1978, requesting information; on July 12, 1978, counsel for the University informed the EEOC that it would not voluntarily produce the information and that the EEOC would have to issue a subpoena.

On August 1, 1978, a subpoena was issued, signed by the EEOC's District Director, requiring the University to produce the following:

"1. Produce a list of all assistant instructors, instructors, assistant professors, associate professors and professors in the Schools of Nursing, Pharmacy, Health Related Professions, and Social Work. For each, indicate sex, date of hire, date of termination, (if applicable), academic degree held, whether tenured or non-tenured, whether part-time or full-time, and position(s) held during the period June 1975 to present. Additionally, indicate each aforesaid employee's initial salary and present salary and length of term of annual contract of each; i.e., ten months, twelve months, etc.

2. Produce the written/printed functional job descriptions and all written/printed materials describing all duties and job/position requirements of all assistant instructors, instructors, assistant professors, associate professors, and professors in each of the aforesaid schools.

3. Produce the written/printed qualifications and requirements necessary to perform the duties of each position, occupied by assistant instructors, instructors, assistant professors, associate professors, and professors in each of the aforesaid schools.

If the records do not exist in the form requested in Item 1 above, production of the information therein requested as most substantively provides the Commission with that information will be accepted as compliance."

The University did not produce the information, but filed a petition with the EEOC seeking revocation of the subpoena on August 3, 1978. On December 22, 1978, the EEOC entered its determination that the subpoena would not be revoked and established January 15, 1979, as the date of production of documents. The University advised the EEOC that it would not comply with the determination.

II. This Action

On November 19, 1979, the EEOC filed the present action with this Court seeking enforcement of the subpoena duces tecum pursuant to Section 710 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-9. Attached to the application was the affidavit of Eugene V. Nelson, EEOC District Director, relating the above facts based on his personal knowledge and review of the EEOC's investigative file, entitled "American Nurses Association v. University of Pittsburgh, Charge No. 034-771609". This Court, on the same day as the application was received, entered an order directing the University to appear on December 12, 1979, to show cause why the subpoena should not be enforced. At the University's request, this hearing was continued to provide the University an opportunity to file an answer and a reply brief. An answer and counterclaim was filed on January 16, 1980 by the University, denying that it is legally required to produce any of the evidence requested by the subpoena.

The University offered numerous defenses:

1. It alleged that ANA members were employed only by the University's School of Nursing and that the information sought was a comparison of faculty mem-

bers employed in different schools, who had different education and training, different academic missions and goals, received different external funding, had different students, program course and course loads, and in all other respects were "not interchangeable or fungible".

2. It alleged that disclosure would result in an unwarranted invasion of the privacy of the University's employees.

3. It alleged that the information would be used only to develop comparative evidence of the University's employment practices and would not further any legitimate EEOC inquiry, thus resulting in direct, immediate, substantial and irreparable harm to the University and its employees.

4. It alleged the subpoena was overly broad and requested information which could not possibly bear any relationship to the subject of the charge filed with the EEOC and, thus, that the EEOC lacked standing to investigate any schools other than the School of Nursing, or to investigate alleged sex discrimination against female faculty members of any school other than the School of Nursing.

5. It also set forth that the subpoena would require the University to prepare compilations of data and perform other research which could not legally be demanded of it by the EEOC, and which would be unduly burdensome.

By way of counterclaim, the University sought, in addition to an order dismissing the EEOC's application, a declaratory judgment under 28 U.S.C. §§2201-2202 that the EEOC regulations with respect to disclosure of information obtained during an investigation were void

and unenforceable, based on Section 709(e) of Title VII, 42 U.S.C. §2000e-8(e), prohibiting any EEOC employee, under pain of criminal penalty, from making public any information obtained during the course of an investigation, and that the EEOC, in compliance with its own regulations (29 C.F.R. §1601.22), discloses information obtained in investigations to certain persons as a matter of course, including charging parties, witnesses and their attorneys. The University claimed that such regulations directly controvert the purposes of the statute, thwarting encouragement of voluntary compliance by stimulating the filing of private actions at the same time that conciliation efforts are occurring, and that disclosure to such persons is tantamount to disclosure to the public at large.

By agreement of counsel, the show cause hearing was held February 6, 1980, and the parties were given full opportunity at that time to present all available evidence.

III. Discussion

A. *The Power to Issue the Subpoena*

The EEOC is authorized by statute at 42 U.S.C. §2000e-5(b) to conduct investigations to determine if an employer, such as the University, is committing employment discrimination in violation of Title VII.

A charge may be filed with the EEOC "by or on behalf of a person" allegedly aggrieved by unlawful employment practices. The EEOC has implemented this Section through procedural regulations, 29 C.F.R. §1601.7, providing that when the charge is on behalf of an aggrieved individual, the person making the charge give to the EEOC the names, addresses and telephone

numbers of persons on whose behalf the charge is being made. Thereafter, the EEOC Compliance Officers are to verify the authorization of such charge. Here, the charging party has satisfied the requirements of this Section with respect to more than 20 allegedly aggrieved persons.

Title VII, Section 709(a), 42 U.S.C. §2000e-8(a), grants to the EEOC and its representatives "access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this sub-chapter and is relevant to the charge under investigation."

In addition, the provisions of 29 U.S.C. §161 are made applicable to EEOC proceedings under Section 710, 42 U.S.C. §2000e-9, and this authorizes the EEOC to require attendance and testimony at its hearings, provides for a petition to revoke the subpoena, and grants the Federal district courts jurisdiction to enforce EEOC subpoenas. 42 U.S.C. §2000e-5(f)(2); 29 U.S.C. §161(2).

The University does not seriously dispute that the subpoena here was properly issued, and we so find.

B. *The Scope of the Subpoena*

Both parties concede that administrative subpoenas may be judically enforced, provided three tests are met: (1) the investigation is within the authority of the agency, (2) the subpoena is not too indefinite, and (3) the information sought is relevant to the charge under investigation. *United States v. Powell,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964) (an Internal Revenue Service summons); *United States v. Morton Salt Co.,* 338 U.S. 632, 652, 70 S.Ct. 357, 369, 94 L.Ed. 401, 415-16

(1950) (a Federal Trade Commission order requiring the filing of reports). Since subpoena enforcement proceedings are summary in nature, this Court is not called upon to decide the issues before the administrative agency for determination, nor are we called upon to determine whether probable cause exists to believe that the University has violated the law. *United States v. Powell, supra; Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946); *EEOC v. Chrysler Corp.,* 567 F.2d 754 (8th Cir. 1977); *EEOC v. Quick Shop Markets, Inc.,* 526 F.2d 802 (8th Cir. 1975).

Here, the EEOC is investigating a Title VII charge which is within its Congressionally mandated authority. *EEOC v. Western Publishing Co.,* 502 F.2d 599 (8th Cir. 1974); *Parliament House Motor Hotel v. EEOC,* 444 F.2d 1335, 1340 (5th Cir. 1971); *Blue Bell Boots, Inc. v. EEOC,* 418 F.2d 355, 358 (6th Cir. 1969). The first prong of the abovementioned three part test has been met.

The University does not make any contention that the subpoena is too indefinite to be enforced. As indicated previously, it requires a listing of the professors in four schools, the Schools of Nursing, Pharmacy, Health Related Professions, and Social Work, indicating sex, date of hiring, date of termination, academic degrees, initial salary, present salary, and contracts of each. It requires production of functional job descriptions and written qualifications and requirements. Thus, the second prong of the three prong test is also met.

We come now to the serious contentions of the Respondent which will be discussed *seriatim.*

1. *The Competency and Relevancy of the Information*

It has been the University's consistent position that the charge being investigated by the EEOC is one involving female faculty members in the School of Nursing and that faculty salaries in other schools are irrelevant. It offered considerable testimony that the salaries of faculty members in the four schools are not comparable because: (1) the composition of the student bodies differ with respect to undergraduate, graduate, full-time, part-time, etc.; (2) the courses, programs and research followed are entirely distinct; (3) the sources of external funding are entirely different; (4) the amount of research and publications required vary; (5) subservience to accrediting bodies varies; (6) the nature of external competition for employees varies, for example, drug companies recruiting pharmacy school faculty compared to the need of hospitals for nurses; (7) the degrees held and schools attended by the faculty are different, as well as the tenure and length of service; (8) the professional representation and standing in the academic community varies; and (9) the courses, research loads and advising loads vary.

When this matter was raised with the EEOC on the petition to revoke the subpoena, the EEOC replied that salary comparisons may show that "women instructors and professors performing similar duties [as male professors] are paid lower salaries."

The EEOC Compliance Manual sets forth that the "scope of inquiry" is normally limited to:

> "[T]he relevant immediate environment, the department, or other similar organizational structure within the decision making authority of one person, where the claim of personal aggrievement arose."

EEOC Compliance Manual § 20.9, CCH EEOC Compliance Manual ¶769.

Here, however, the entire faculty in the School of Nursing is female and information beyond the School of Nursing may be crucial to the EEOC's determination of probable cause. *See Rich v. Martin Marietta Corp.*, 522 F.2d 333, 344 (10th Cir. 1975) (requested information on plant-wide basis was relevant since it might be crucial to establishing prima facie case).

We are cited the opinion of Judge Barron P. McCune of this Court in *Hopewell v. University of Pittsburgh*, 79 F.R.D. 689, 694 (W.D.Pa. 1978), which rejected a comparison of non-comparable groups. In addition, the University cited several cases which have rejected comparisons of faculty jobs in one school with those of different schools. We agree with the approach in those cases. However, each case involved a finding by the court on the merits of the case that the plaintiff failed to establish the equality of one teaching position *vis-a-vis* another.

As previously noted, the Court's function in a subpoena enforcement proceeding is to determine the relevancy of the requested material. Here, the EEOC seeks salary and related information of male and female professors in the allied health schools. It is true that faculty members of different schools may not be fungible, but this does not mean that the Court can rule at this point that the information is irrelevant. As noted by the EEOC in its brief, "whether information pertaining to one school may aid in an investigation of another school is a matter which cannot be determined until the information is examined." We cannot take the word of the University nor does it arise from the evidence, that the

statistics requested will be meaningless. In this regard, we are reminded by Judge Barrett of the Tenth Circuit in *EEOC v. University of New Mexico*, 504 F.2d 1296, 1302-03 (10th Cir. 1974), that "the broad sweep of [Title VII] is directed to the elimination of employment discrimination", and the law governing the limits on the administrative power of investigation is not so circumscribed as to prevent the enforcement of subpoenas unless they are plainly incompetent or irrelevant to any lawful purpose. *See also EEOC v. Cambridge Tile Manufacturing Co.*, 590 F.2d 205 (6th Cir. 1979) (Notions of relevancy at investigatory stage are very broad, and so long as EEOC is not wandering into wholly unrelated areas, it has the power to subpoena documents concerning any employer practice which may shed light on discrimination charged).

We note that the charge here is not restricted to the School of Nursing, but its dimensions are University-wide. The EEOC points to the fact that they have not attempted in this subpoena to go University-wide, but only seek information relative to particular schools thought to be of comparative relevance to establish or refute a conclusion that reasonable cause exists to believe discrimination has occurred on a University-wide level, or at a lower level. We do not, at this time, pass upon the University-wide conclusion sought to be established, for that question is not before us.

2. *The Subject of the Charge*

As previously noted, the University also took the position that the Schools of Health Related Professions, Social Work and Pharmacy, which, in addition to the School of Nursing, were subjects of the subpoena re-

quest, were separate and distinct segments of the University and therefore the EEOC had no standing to seek salary information on female faculty members who were not, and could not be, represented by the ANA.

The University claims that the right of an organization to file a charge is derivative of the alleged grievance of its members. The University does not dispute the ability of the ANA to file a charge on behalf of persons "claiming to be aggrieved", but they would limit the effect of the charge to the School of Nursing faculty which, incidentally, are all females.

It is true, for example, that a complainant's charge of race discrimination does not permit the EEOC to investigate sex discrimination. *King v. Georgia Power Co.*, 295 F.Supp. 943 (N.D.Ga. 1968), *aff'd* 412 F.2d 462 (5th Cir. 1969). But this does not mean that the ANA cannot challenge activity which affects its members by a University-wide policy. This is not a situation as revealed in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), where the Club failed to allege that its members were adversely affected by the proposed action. Even in the *Sierra* case, the court recognized that an organization whose members are injured may represent those members in a proceeding for judicial review. The nurses here are allegedly injured by the University-wide policy and the EEOC is conducting the investigation thereon. Therefore, there is no substance to the claim that the EEOC lacks standing to inquire into comparative salaries of other schools, so that the subpoena would be in excess of its statutory authority.

3. *Burdensomeness*

The University raises, but does not strongly argue, that it has no lists or other compilations containing all of the requested data and, therefore, the EEOC requirements would be burdensome to it. It offered no evidence that an excessive burden would be imposed in light of the restriction of the subpoena to the four schools. Furthermore, it is noted that Item 1 of the subpoena states that if the information is not in existence, production of the requested information "as most substantively provides the Commission with that information will be accepted as compliance."

Even if production of evidence imposes some burden, we believe that so long as the information requested is relevant and material, the cost is "part of the social burden" of our present day society, *see Bradley Lumber Co. v. NLRB,* 84 F.2d 97 (5th Cir. 1936), and may include the compilation of lists prepared from existing records. *New Orleans Public Service, Inc. v. Brown,* 507 F.2d 160 (5th Cir. 1975). *Cf. NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969).

4. *The Confidentiality and Privilege of the Information Sought*

The University takes the position that the EEOC seeks salary and other data which goes to the heart of its relationships with its faculty members in four different schools. They claim that disclosure would do irreparable harm to the University while providing no tangible benefit to the EEOC.

While the information may be extremely important to the University, this argument was not accepted by Judge Barrett in *EEOC v. University of New Mexico,*

supra, where he cogently reasoned that an invocation of the Fourth Amendment prohibition against unreasonable searches and seizures, predicated on the basic proposition that faculty personnel files are confidential, could not be sustained in light of the proscription contained in the statute against public disclosure, in any matter, of information obtained in the course of investigation (42 U.S.C. §2000e-8(e)). *Cf. Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973) (denying a taxpayer's Fifth Amendment claim of privilege in an Internal Revenue investigation based upon the expectation of privacy of records delivered to his accountant for the purpose of preparing his income tax return). Thus, although the information sought may be confidential, this is not a basis for denying enforcement of the subpoena.

C. *The Counterclaim*

By way of counterclaim, the University seeks a declaratory judgment and an injunction that regulations promulgated by the EEOC permitting disclosure of information obtained during the course of an investigation are void and unenforceable, and seeks an injunction against disclosing any information obtain in this investigation to *any person*. As noted, Section 709(e) of Title VII, 42 U.S.C. §2000e-8(e), prohibits any employee of the EEOC, under pain of criminal penalty, from making public any information obtained during the course of any EEOC investigation. Regulations promulgated by EEOC at 29 C.F.R. §§1601.22 and 1610.17(d), as implemented in the special disclosure rules of the EEOC Compliance Manual, authorize the EEOC to release information obtained during its investigations to "charging parties, or their attorneys, respondents or their at-

torneys or witnesses where disclosure is deemed necessary for securing appropriate relief."

Our investigation reveals that the restrictions upon disclosure by the EEOC of investigative information contained in §§2000e-5(b) and 2000e-8(e) and their effect upon the validity of EEOC's Regulations and Compliance Manual have been considered by four Courts of Appeals with conflicting conclusions. The Fifth Circuit in *H. Kessler & Co. v. EEOC,* 472 F.2d 1147 (5th Cir.) (en banc) *cert. denied* 412 U.S. 939, 93 S.Ct. 2774, 37 L.Ed.2d 398 (1973), held that charging parties and their attorneys are not members of the "public" within the meaning of the restrictive statutory language and consequently the Regulations and the Compliance Manual do not exceed the statute and thus are valid and enforceable. The District of Columbia Circuit in *Sears, Roebuck & Co., v. EEOC,* 581 F.2d 941 (D.C. Cir. 1978), the Seventh Circuit in *Burlington Northern, Inc. v. EEOC,* 582 F.2d 1097 (7th Cir. 1978), *cert. denied* 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979), and the Fourth Circuit in *EEOC v. Joseph Horne Co.,* 607 F.2d 1075 (4th Cir. 1979), reached the opposite conclusion. The Third Circuit has not considered this problem.

The analysis of the legal arguments, the legislative history and the policy considerations on both sides of the question are fully developed in *Kessler, Sears, Burlington,* and *Horne*; further argument will accomplish little.

In our opinion, the statutory scheme of enforcing Title VII is consistent with the position taken under 29 C.F.R. §1610.17(d), that individual charging parties are not members of the public within the meaning of Section 709(e). We will therefore direct that the EEOC

shall make no disclosure of the investigative material except in accordance with the above cited regulations. The subpoena subject to the protective order as above indicated, will be enforced.

An appropriate order will be entered.

/s/ DANIEL J. SNYDER, JR.
United States District Judge

Dated: March 26, 1980

cc: Lanier E. Williams, Esq.
EEOC—Philadelphia District
127 North 4th Street
Philadelphia, Pa. 19106

James J. Restivo, Jr., Esq.
Reed, Smith, Shaw & McClay
747 Union Trust Building
Pittsburgh, Pa. 15219

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Applicant
v.
UNIVERSITY OF PITTSBURGH,
Respondent

Miscellaneous No. 7653

ORDER

AND NOW, to-wit, this 26th day of March, 1980, after hearing and due consideration of the arguments and briefs of counsel, and for the reasons set forth in the Opinion filed herewith,

IT IS ORDERED, ADJUDGED AND DECREED that the Respondent shall comply with the EEOC subpoena in its entirety. The University of Pittsburgh is therefore directed to comply with the subpoena as shall be directed by the EEOC.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the EEOC shall make no disclosure of the material obtained as a result of the instant investigation except in accordance with 29 C.F.R. §§1601.22 and 1610.17(d).

/s/ DANIEL J. SNYDER, JR.
United States District Judge

cc: Lanier E. Williams, Esq.
James J. Restivo, Jr., Esq.

Appendix C

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Applicant v. UNIVERSITY OF PITTSBURGH, Respondent	Miscellaneous No. 7653

ORDER*

AND NOW, this 7th day of April, 1980, *the Opinion and Order dated March 26, 1980, is hereby amended in the following respects:* Motion denied.

1. The University contended and the Court finds that the EEOC did not obtain affidavits from allegedly aggrieved persons as required by the EEOC's own Manual.

2. The School of Nursing had at least one male faculty member during the period covered by the subpoena.

3. The sole purpose of the EEOC subpoena was to request information that would allow the EEOC to compare instructors or professors across school lines. The

*The italicized portion of this Order represents that portion of the proposed Order which the District Court crossed out in entering its Order denying the Motion. See R.181a-182a of the Appendix in the Third Circuit.

uncontradicted evidence establishes that the jobs and salaries of faculty members in different schools are not comparable.

4. There is no evidence in the record establishing the relevancy of the information sought as it relates to part-time faculty members.

5. The School of Social Work is not a health-related school.

6. Under the regulations of the EEOC, information collected in this investigation could be disclosed to the American Nurses' Association, the 29 allegedly aggrieved persons and attorneys for each of the foregoing.

7. The enforcement of the EEOC subpoena is hereby denied.

/s/ DANIEL J. SNYDER, JR.
United States District Judge

APPENDIX D

The pertinent statutory provisions of Title VII of the Civil Rights Act are the following:

Section 709(a) of Title VII, 78 Stat. 255, 42 U.S.C. §2000e-8(a):

> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

Section 710 of Title VII, 78 Stat. 264, *as amended,* 42 U.S.C. §2000e-9:

> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

The pertinent statutory provisions of the National Labor Relations Act are the following:

Section 11 of the National Labor Relations Act, 49 Stat. 455, *as amended,* 29 U.S.C. §§161(1) and 161(2):

> For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title—
>
> (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times

have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession,

within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.